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IN THE
COURT OF APPEALS OF INDIANA

HAROLD E. MUMMEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A04-0708-CR-465
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0701-FA-7, 02D04-0612-FA-72

May 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary[1]

After pleading guilty under separate cause numbers to rape and attempted rape, Harold E. Mummey appeals his consecutive twenty-year sentences. On appeal, Mummey contends that the trial court improperly recognized the nature of the offense as an aggravating factor and that his aggregate forty-year sentence is inappropriate in light of the nature of the offenses and the character of the offender. Concluding that the aggravator is proper and that his sentence is not inappropriate, we affirm.

Facts and Procedural History[2]

On October 28, 2006, M.B. left her Fort Wayne, Indiana, home to use a payphone. Mummey, who was on probation at the time, drove up next to the payphone and offered M.B. a ride home. After M.B. accepted the offer and got into Mummey's car, he drove her to an alleyway despite her protests. Mummey then placed a hand around M.B.'s neck and a sharp object against her neck and forced her to have sexual intercourse with him. Afterward, he allowed her out of the car.

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[1] We note that Mummey included a copy of the presentence investigation report on white paper in his appendix. *See* Appellant's App. p. 21-28, 52-59. We remind Mummey that Indiana Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Administrative Rule 9(G)(1)(b)(viii) states that "all pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part: "Every document filed in a case shall separately identify documents that are excluded from public access pursuant to Admin. R. 9(G)(1) as follows: (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked 'Not for Public Access' or 'Confidential.'"

[2] We have supplemented the facts provided as a factual basis during Mummey's guilty plea hearing with information contained in the probable cause affidavits, upon which Mummey relies in his brief.

On December 7, 2006, J.W. was walking along a street in Fort Wayne when Mummey drove up alongside her and offered her a ride home. Instead of taking J.W. home, Mummey pulled his car into an alleyway, stopped the vehicle, and placed a sharp object against her neck. Mummey beat J.W. with his fist, made sexual demands of her, and forced himself on top of her. He threatened to cut her throat if she resisted. He then attempted to pull down her pants but was unsuccessful. After a struggle, Mummey let J.W. exit the vehicle, and she flagged down police. The police were able to apprehend Mummey, and J.W. positively identified him and his car.

The State charged Mummey under Cause No. 02D04-0612-FA-72 ("FA-72") with Count I: attempted rape as a Class A felony,[3] Count II: sexual battery as a Class C felony,[4] and Count III: battery as a Class C felony[5] for his offenses against J.W. M.B. later identified Mummey as her attacker, and the State charged him under Cause No. 02D04-0701-FA-7 ("FA-7") with Count I: rape as a Class A felony[6] and Count II: strangulation as a Class D felony[7] for his offenses against M.B. The State later amended its charge under Count I of FA-7 to rape as a Class B felony[8] and its charge under Count I of FA-72 to attempted rape as a Class B felony.[9]

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[3] Ind. Code §§ 35-42-4-1(b); 35-41-5-1.

[4] Ind. Code § 35-42-4-8(b).

[5] Ind. Code § 35-42-2-1(a)(3).

[6] I.C. § 35-42-4-1(b).

[7] Ind. Code § 35-42-2-9.

[8] I.C. § 35-42-4-1(a).

[9] I.C. §§ 35-42-4-1(a); 35-41-5-1.

On June 8, 2007, Mummey pled guilty pursuant to a plea agreement to attempted rape as a Class B felony and rape as a Class B felony. Appellant's App. p. 17-19, 20, 51. In exchange, the State dismissed all remaining charges under FA-7 and FA-72. The plea agreement permitted the trial court to sentence Mummey at its discretion, with the caveat that the sentences imposed for these two offenses would be consecutive. *Id.* at 17. After a sentencing hearing, the trial court sentenced Mummey to consecutive twenty-year terms. In so doing, the court recognized in mitigation that Mummey pled guilty and in aggravation that Mummey has an extensive criminal history and committed these crimes in a particularly brutal manner. Sent. Tr. p. 20-22. Acknowledging that forty years executed was the maximum sentence that Mummey could receive, the trial court sentenced him to twenty years on each count to be served consecutively. *Id.* at 22. Mummey now appeals his sentence. FA-7 and FA-72 have been consolidated for the purpose of this appeal.

Discussion and Decision

On appeal, Mummey contends that the trial court improperly recognized the nature of the offense as an aggravating factor and that his aggregate forty-year sentence is inappropriate in light of the nature of the offenses and the character of the offender.[10]

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[10] We note that the plea agreement purports to restrict Mummey's right to appeal his sentence. Specifically, the plea agreement provides: "The defendant knowingly, intelligently and voluntarily waives his/her right to challenge the reasonableness of the sentence received in this case under Appellate Rule 7(B). Defendant also knowingly, intelligently and voluntarily waives his right to challenge the sentence on the basis that it is erroneous." Appellant's App. p. 18. The law is presently in flux regarding whether a defendant may validly waive the right to challenge the appropriateness of his or her sentence. *See Creech v. State*, 35A02-0612-CR-1140 (Ind. Ct. App. Aug. 6, 2007), *trans. granted*. The State does not contend that Mummey is precluded from raising these issues on appeal, however, and so we need not address whether Mummey has waived his right to appeal his sentence. We opt to address his arguments on their merits.

Although he frames his argument as falling purely under Indiana Appellate Rule 7(B), it is apparent that he also challenges the propriety of the recognition of an aggravating circumstance. These are two distinct arguments with different standards of review. *See Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

I. Abuse of Discretion

Mummey first contends that the trial court erred in finding the nature of his offenses to be an aggravating circumstance. Appellant's Br. p. 6. We review a trial court's identification of aggravating and mitigating circumstances for an abuse of discretion. *Anglemyer*, 868 N.E.2d at 490-91. An abuse of discretion occurs when the court's sentencing decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *McElroy v. State*, 865 N.E.2d 584, 588 (Ind. 2007).

The nature and circumstances of a criminal offense may properly be identified as an aggravating circumstance. *Id.* at 590. While "a material element of a crime may not be used as an aggravating factor," a trial court may "properly consider the particularized circumstances of the factual elements as aggravating factors." *Id.* at 589-90 (citations omitted). "Generally, this aggravator is thought to be associated with particularly heinous facts or situations." *Id.* at 590 (quotation omitted). At the conclusion of Mummey's sentencing hearing, the trial court explained its finding of this aggravating circumstance as follows:

> I read carefully the letters written [by the victims], included in the PSI's, and as I do with these things, I then went back and compared them with the

> probable cause affidavits. . . . [W]hen I read these ladies[’] letters and compared them with the probable cause affidavits, it’s very clear that these statements of these ladies are very accurate and very realistic, very on point and that these ladies each suffered horrendous, horrific experience[s] at the hands of this man. It’s perfectly clear that this man was just plain cruel. Therefore, based upon...I’ll find that there are aggravating circumstances in the form of Defendant’s extensive criminal history as I have noted. As well as the nature of these offenses. These offenses do not...I want to make it clear that these offenses fall far outside and beyond the ordinary circumstances of this crime as it may be generically defined. It’s a horrible crime in the first instance. But what happened to these ladies is far beyond what anyone might anticipate as being the, if you will, and I’m offended when I think of it, let alone say it, of an ordinary rape, this is not an ordinary rape.

Sent. Tr. p. 20-22. It is apparent from the trial court’s sentencing statement that it considered the particularized facts of Mummey’s crimes against M.B. and J.W. and found them to be particularly “cruel” and “horrendous.” *Id.* at 21. The court further explained that these offenses went beyond the elements necessary for rape and attempted rape as Class B felonies. Indeed, the record reveals that, during both instances of conduct, Mummey pressed a sharp object against the throats of his victims. During his attack upon M.B., Mummey placed his hand around her throat. During his later attack upon J.W., Mummey beat her and threatened to slit her throat. The trial court did not err in considering these circumstances in aggravation. The trial court did not abuse its discretion is recognizing this aggravating factor.

II. Inappropriateness

Mummey also contends that his aggregate forty-year sentence is inappropriate. Even where a trial court has not abused its discretion in imposing a sentence, the Indiana Constitution authorizes us to conduct independent appellate review and sentence revision, pursuant to the paradigm set forth by Indiana Appellate Rule 7(B). *Anglemyer*, 868

N.E.2d at 491. Indiana Appellate Rule 7(B) provides: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The burden rests with the defendant to persuade us that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). After due consideration of the trial court's decision, we cannot say that Mummey's sentence is inappropriate.

The nature of Mummey's offenses is very serious, or, as the trial court found, "horrific." Sent. Tr. p. 21. Mummey drove around Fort Wayne searching for women to sexually assault. After he lured M.B. and J.W. into his car on separate occasions, he drove the frightened women to alleyways, where he attacked them while holding sharp objects to their necks. He raped M.B. and was only unable to rape J.W. because she was wearing pants that were difficult to remove. Mummey placed his hand around M.B.'s neck and beat and threatened to slit J.W.'s throat. Nothing about the nature of these offenses warrants revision of his sentences.

Mummey's character also does not call for revision of his sentences. Mummey committed these offenses while on probation for other crimes. Prior to these offenses, Mummey had an extensive criminal history which included ten felonies and five misdemeanors committed over a period of over seventeen years. Further, at the time of sentencing for the instant offenses, Mummey had charges pending in Grant County, Indiana, for Class A felony rape (two counts), Class A felony criminal deviate conduct, Class B felony criminal deviate conduct, Class B felony criminal confinement (two

counts), Class B felony armed robbery, and several misdemeanors. Mummey's conduct reflects a disregard for the law and an unwillingness to conform his behavior to acceptable standards. *See Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005) ("[A] record of arrest, particularly a lengthy one, may reveal that a defendant has not been deterred even after having been subject to the police authority of the State. Such information may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime."). His sentence is not inappropriate in light of his character.

Conclusion

The trial court did not abuse its discretion in finding the nature of Mummey's offenses to be an aggravating circumstance, and Mummey's sentence is not inappropriate in light of the nature of the offenses and his character.

We affirm.

MAY, J., and MATHIAS, J., concur.